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In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES HASKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for failure to file corporate income tax returns on the grounds that he was denied effective assistance of counsel, that a corporate officer cannot be convicted of failure to file a corporate return, and that the trial court improperly admitted certain evidence.

After a jury trial in the United States District Court for the Central District of California, petitioner was found guility on three counts of having failed to file corporate income tax returns for 1970-1972, in violation of 26 U.S.C. 7203. The district court sentenced him to consecutive one-year terms of imprisonment on the first two counts, a five-year period of probation on the third count, and imposed a fine of $10,000 for each of the three counts.

1. Petitioner contends (Pet. 7) that the courts of appeals are divided as to the correct standard to be applied in assessing a claim of ineffective assistance of counsel, asserting (Pet. 8) that this case "presents an appropriate vehicle for discussion of this issue * * *." But petitioner does not claim that the court of appeals applied an incorrect standard in this case or that a standard should have been applied that was more favorable to him. Indeed, the court of appeals applied the "reasonably effective assistance" standard which is more favorable to a defendant (see, *e.g.*, *United States* v. *Wright*, 573 F. 2d 681, 684 (C.A. 1)) than requiring him to establish that the conduct of his counsel made the trial "a farce or mockery of justice."[1] See, *e.g.*, *United States* v. *Bubar*, 567 F. 2d 192, 201-202 (C.A. 2), certiorari denied, 434 U.S. 872. Since the decision below held against petitioner under "a more lenient standard requiring 'reasonably competent assistance of counsel' " (*United States* v. *Madrid Ramirez*, 535 F. 2d 125, 129-130 (C.A. 1)), he would not prevail

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[1]Like the decision below, eight of the circuits have applied the "reasonably effective assistance" standard. See, *e.g.*, *United States* v. *DeCoster*, 487 F. 2d 1197, 1202 (C.A. D.C.); *Moore* v. *United States*, 432 F. 2d 730-736 (C.A. 3); *Coles* v. *Peyton*, 389 F. 2d 224, 226 (C.A. 4); *United States* v. *Fessel*, 531 F. 2d 1275, 1278 (C.A. 5); *United States* v. *Toney*, 527 F. 2d 716, 720 (C.A. 6); *United States ex rel. Williams* v. *Twomey*, 510 F. 2d 634, 640 (C.A. 7), certiorari denied *sub nom. Sielaff* v. *Williams*, 423 U.S. 876; *United States* v. *Easter*, 539 F. 2d 663, 666 (C.A. 8); *Cooper* v. *Fitzharris*, 551 F. 2d 1162, 1166 (C.A. 9), pending on rehearing *en banc*.

The remaining three circuits have adhered to the stricter standard that requires a defendant to establish that his trial was a "farce and a mockery." See, *e.g.*, *United States* v. *Wright*, 573 F. 2d 681, 684 (C.A. 1); *Rickenbacker* v. *Warden*, 550 F. 2d 62, 65-66 (C.A. 2); *United States* v. *Fitts*, 576 F. 2d 837 (C.A. 10). While some courts have considered the application of intermediate standards, see *de Kaplany* v. *Enomoto*, 540 F. 2d 975, 987 (C.A. 9), no standard other than "reasonably effective assistance" or "farce and a mockery" has gained general acceptance.

under either line of authority. See *deKaplany* v. *Enomoto*, 540 F. 2d 975, 987 (C.A. 9) (*en banc*). Accordingly, this case is not an appropriate vehicle for resolution of the conflict.

In support of his claim that he was denied the effective assistance of counsel, petitioner (Pet. 8-9) points to three instances at trial.[2] But as the court of appeals pointed out (Pet. App. 4), the right to effective assistance of counsel does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance." *MacKenna* v. *Ellis*, 280 F. 2d 592, 599 (C.A. 5) (emphasis in original). Accord, *Cooper* v. *Fitzharris*, 551 F. 2d 1162, 1166 (C.A. 9). Here, while recognizing that "[t]he trial [in this case] was not perfect * * *," the court of appeals concluded that petitioner's counsel rendered "reasonably effective assistance" (Pet. App. 4). Since " '[a] defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials" (*Brown* v. *United States*, 411 U.S. 223, 231-232), quoting from *Lutwak* v. *United States*, 344 U.S. 604, 619), the court of appeals held that the conduct of petitioner's counsel was within " 'the range of

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[2]Petitioner contends (Pet. 8-9) that his trial counsel failed to object to the admission of certain hearsay evidence and to statements of personal belief, expressed by the prosecutor in closing arguments. The record shows that petitioner's counsel did make objections when they were appropriate (Tr. 17-19, 87, 90-93, 106, 126, 132-133, 282-283). Moreover, petitioner's claim (Pet. 9) that his counsel failed to establish a proper foundation for the admission of certain documents assumes that such a foundation existed. But the court of appeals properly refused to make such an assumption because it is not supported by the record (Pet. App. 2; Tr. 474-493, 504-512, 518-520). At all events, as the court of appeals concluded, the documents would have been cumulative of testimony already before the jury (*ibid.*). Thus, any errors and omissions of counsel did not prejudice the fairness of petitioner's trial (see Pet. App. 4).

competence demanded of attorneys in criminal cases.' " *Tollett* v. *Henderson,* 411 U.S. 258, 266-268, citing *McMann* v. *Richardson,* 397 U.S. 759, 770-771.

2. Petitioner further contends (Pet. 10-11) that he could be convicted of willfully failing to file corporate income tax returns because he was not a "person required * * * to make a return" under 26 U.S.C. 7203. Petitioner admits, however, that he was the president of the Ecktagraphics Corporation (Pet. 4) and does not challenge the conclusion of the court of appeals that he had "total control" (Pet. App. 6) over the corporation. Thus, since petitioner was an "officer" under 26 U.S.C. 7343, it was for the jury to resolve whether he was "under a duty to perform the act in respect of which the violation occurs." While petitioner sought at trial to shift responsibility for the filing of returns to an accountant employed by the corporation (Pet. App. 6-7), the jury heard testimony that the employee was merely a figurehead, that petitioner had "final authority" in the corporation, that he ran the operations and negotiated all of its business (Tr. 94, 114-115, 385; Pet. App. 6-7). There was accordingly ample evidence to support the verdict. See *Bloom* v. *United States,* 272 F. 2d 215, 221-223 (C.A. 9); *Lumetta* v. *United States,* 362 F. 2d 644, 647 (C.A. 8).

3. Finally, petitioner argues (Pet. 13-15) that inadmissible hearsay evidence was used to establish that Ecktagraphics Corporation had failed to file income tax returns for 1970-1972. The evidence in question was the testimony of an official of the Internal Revenue Service Center in Fresno, California. The IRS official testified that after requesting a transcript of two employer identification numbers from the National Computer Center in West Virginia, he received information that Ecktagraphics had filed an income tax return for its taxable year ending May 1969, but that the Internal Revenue Service had no record of Ecktagraphics having

filed returns for 1970-1972 (Tr. 146-157). Petitioner argues that this testimony did not comply with the requirements of the hearsay exception of Rule 803(10) of the Federal Rules of Evidence, and should have been excluded. That rule provides that whether or not the declarant is available, "the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form was regularly made and preserved by a public office or agency * * * [may be proved by] testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry."

Contrary to petitioner's assertion (Pet. 15), Rule 803(10) does not by its terms require the testimony of the "custodian" of the records in question. See *Jackson* v. *United States,* 250 F. 2d 897, 900-901 (C.A. 5). In this respect, it differs from Rule 803(6), which relates to the introduction of records of regularly conducted activity. Thus, the evidence that a diligent search was made was sufficient to admit the testimony of the IRS official that the Service had no record that Ecktagraphics filed returns for 1970-1972. As the court of appeals correctly concluded (Pet. App. 7), "[W]e can discern no reason to have the person who actually ran the computor to testify. Reliability was never seriously in question." See, *e.g., United States* v. *Harris,* 551 F. 2d 621, 622 (C.A. 5), certiorari denied, 434 U.S. 836; *Smith* v. *United States,* 353 F. 2d 838, 844 (C.A. D.C.), certiorari denied *sub nom. Cunningham* v. *United States,* 384 U.S. 910.[3]

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[3]Petitioner also contends (Pet. 12-13) that there is a conflict among the courts of appeals as to whether a prosecutor's improper statement to the jury of personal belief requires an objection by the defendant to constitute reversible error. But the results in such cases depend upon the probability of prejudice in the particular circumstances. See *Berger* v. *United States,* 295 U.S. 78, 88-89. Here, as the court of appeals concluded (Pet. App. 4-5), the district court's instruction to the jury that the statements of counsel were not evidence removed any possible prejudice resulting from the prosecutor's use of the phrase "I think."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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